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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN,
SECRETARY OF LABOR, APPELLANT

v.

DOROTHY BLITZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Daniel Amendment, which prohibits persons who advocate the violent overthrow of the United States government from participating in a program under the Comprehensive Employment and Training Act, and is interpreted by the Secretary of Labor to apply only where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, violates the First Amendment.

2. Whether, in view of the administrative procedures, culminating in review by the courts of appeals, provided by Congress to consider complaints concerning the administration of programs under the Comprehensive Employment and Training Act, appellee's claim that she was unlawfully excluded from a CETA program was properly brought directly in the district court.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-12a) is reported at 538 F. Supp. 1119.

JURISDICTION

The order of the district court (App. B, *infra*, 13a) was entered on May 14, 1982, and a notice of appeal to this Court (App. C, *infra*, 14a) was filed on June 9, 1982. On July 29, 1982, Justice Brennan extended the time for docketing the appeal to October 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATUTE INVOLVED

Pub. L. No. 97-92, 95 Stat. 1183,[1] provides in part:

> None of the funds appropriated or otherwise made available by this Act may be used, pursuant to the Comprehensive Employment and Training Act, for the participation of individuals who publicly advocate the

[1] See page 3 note 2, *infra*.

violent overthrow of the Federal Government, or who have, within the past five years, publicly advocated the violent overthrow of the Federal Government.

STATEMENT

1. The Comprehensive Employment and Training Act of 1973 (CETA) is designed to "provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons" through a "decentralized system of Federal, State and local programs." 29 U.S.C. (Supp. IV) 801. Most CETA programs are administered at the local level by a "prime sponsor"—generally, a unit of state or local government. 29 U.S.C. (Supp. IV) 811; see 29 U.S.C. (Supp. IV) 841 *et seq.* The Secretary of Labor has overall responsibility for administering the Act.

CETA requires every prime sponsor to "establish and maintain a grievance procedure * * * for handling complaints about the program arising from its participants * * * and other interested persons." 29 U.S.C. (Supp. IV) 816(a)(1). The Act provides that a prime sponsor must hold a hearing within 30 days after a grievance is filed and must render a decision on the grievance within 60 days after it is filed (29 U.S.C. (Supp. IV) 816(a)(1)). The Secretary of Labor has issued regulations governing the prime sponsors' grievance procedure. 20 C.F.R. 676.83, 676.84.

After exhausting the prime sponsor's remedy, a party may file a complaint with the Secretary. 29 U.S.C. (Supp. IV) 816(b). The Act requires the Secretary to investigate the complaint; if the Secretary finds substantial evidence that a prime sponsor or other recipient of funds is not complying with the Act, he must hold a hearing to determine whether the allegations in the complaint are true (29 U.S.C. (Supp. IV) 816(b)). Regulations provide that this hearing, if requested, will be held on the record before an Administrative Law Judge. 20 C.F.R. 676.88(f). The parties have the right to subpoena witnesses and to discovery according to the Federal Rules of Civil Procedure. 20 C.F.R. 676.89(e). The Secretary is authorized to take a wide range of corrective measures, including revocation of

a prime sponsor's CETA plan and a cut off of funds, if he finds that a sponsor has violated the Act or its implementing regulations. See 29 U.S.C. 816(c)-(g).

The Act provides that "any interested person [who] is dissatisfied with or aggrieved by any final action of the Secretary" taken under the Act's grievance procedure may file a petition for review in the appropriate United States court of appeals. 29 U.S.C. (Supp. IV) 817(a). The court of appeals may set aside the Secretary's action if it is not supported by substantial evidence (29 U.S.C. (Supp. IV) 817(b)).

2. In December 1981, as part of a statute appropriating funds for the Department of Labor, Congress enacted the Daniel Amendment, which prohibits the expenditure of CETA funds in connection with "the participation of individuals who publicly advocate the violent overthrow of the Federal Government, or who have within the past five years, publicly advocated the violent overthrow of the Federal Government."[2] The Daniel Amendment makes no

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[2] The Daniel Amendment was part of Pub. L. No. 97-92, enacted on December 15, 1981. 95 Stat. 1183. Section 101(a)(3) of the Pub. L. No. 97-92, 95 Stat. 1183, provided that "when an Act listed in this subsection has been reported to a House but not passed by that House as of December 15, 1981, it shall be deemed as having been passed by that House * * *." The Department of Labor's Fiscal 1982 Appropriations Act was listed in Subsection 101(a). On October 6, 1981, the Daniel Amendment was passed by the House of Representatives as part of the Department of Labor's Fiscal 1982 Appropriations Act. H.R. 4560. 97th Cong., 1st Sess. § 514 (1981); 127 Cong. Rec. H7089, H7097 (daily ed., Oct. 6, 1981). The Senate Committee on Appropriations reported to the Senate a provision identical to the Daniel Amendment on November 9, 1981. S. Rep. No. 97-268, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. S13145 (daily ed., Nov. 9, 1981). Thus, pursuant to Section 101(a)(3) of Pub. L. No. 97-92, the Daniel Amendment was "deemed as having been passed by [the Senate]." Since the Daniel Amendment was part of the Department of Labor's Fiscal 1982 Appropriations Act incorporated in Pub. L. No. 97-92, and was passed by the House and deemed passed by the Senate, it became law when Pub. L. No. 97-92 was signed by the President.

The Daniel Amendment would have expired on March 31, 1982 (see Pub. L. No. 97-92, Section 102, 95 Stat. 1193), but on that date Congress passed Pub. L. No. 97-161, 96 Stat. 22, extending the Act of which the Daniel Amendment was a part. The Amendment would again have expired on September 30, 1982, but on October 1, 1982, Congress passed a statute that continued it in effect. Pub. L. No. 97-276.

reference to a provision in CETA itself specifying that "[n]o person * * * shall on the ground of * * * political affiliation or belief be excluded from participation in, be denied the benefits of, [or] be subjected to discrimination under * * * any program or activity funded" under the Act (29 U.S.C. (Supp. IV) 834(a)).

From May 1980 to May 1981, appellee participated in a CETA job training program sponsored by the Virginia Employment Commission (VEC). In May 1981, after completing 600 of the required 700 hours of study, appellee obtained a leave of absence from the training program (App. A, *infra*, 2a).

In January 1982, after passage of the Daniel Amendment, appellee sought to be readmitted to the VEC program (App. A, *infra*, 3a). Acting without instructions from the Secretary of Labor, the VEC required appellee and other applicants to answer the question: "Do you now, or have you within the past five years, publicly advocated the violent overthrow of the Federal Government?" (*ibid.*). The VEC specified that an applicant who answered this question in the affirmative or refused to answer would be disqualified from participating in the program (*id.* at 3a-4a). Appellee declined to answer the VEC question (*id.* at 4a).

3. Without invoking any of the CETA grievance procedures, and before the VEC had acted on her application, appellee brought this suit against the Secretary of Labor in the United States District Court for the District of Columbia. She sought a declaration that the Daniel Amendment is unconstitutional and an injunction requiring the Secretary to direct the VEC to process her application without regard to her political views (App. A, *infra*, 4a). The Secretary, in papers filed in the district court, stated that as he interpreted the Daniel Amendment, "the only type of advocacy which would result in a determination of ineligibility for participation in the CETA program would be advocacy of the use of force or violence to overthrow the government *where such advocacy is directed to inciting or producing*

imminent lawless action and is likely to incite or produce such action." Memorandum of Points and Authorities of the Secretary of Labor at 14; see App. A, *infra*, 8a.

The district court granted appellee's motion for summary judgment. It rejected the Secretary's contention that appellee had to exhaust the grievance process specified in CETA and could not bring this action directly in district court. The district court acknowledged that litigants ordinarily are required to exhaust administrative remedies in order "to prevent premature interference with agency processes, to afford parties and the courts the benefit of agency experience and expertise, to compile an adequate record for judicial review, and to afford an opportunity for the agency to correct its own errors" (App. A, *infra*, 6a). The court declared, however, that it would be "entirely inappropriate" to require appellee to pursue the remedies established by CETA because "the sole question here is the 'purely legal' one of the constitutionality of a congressional enactment" (*id.* at 7a) and the Secretary's "expertise * * * is of doubtful quality in the resolution of a constitutional challenge" (*id.* at 6a). The court added that requiring the exhaustion of administrative remedies also would be inappropriate because (*id.* at 7a):

> The Secretary has failed to provide the VEC with any guidance as to the implementation of [the Daniel A]mendment * * *. As a result, the Virginia officials have merely applied the plain language of the amendment. [Appellee's] action, then, is properly construed as challenging the Secretary's failure to insist that this amendment is implemented in a fashion consistent with the first amendment. The administrative remedies allegedly available to [appellee] apply to disputes between a prime sponsor and a CETA employee, not between an employee and the Secretary.

The district court then concluded that the Daniel Amendment is invalid on its face because it "does not draw a line between mere advocacy and advocacy which incites and is likely to produce violent action" (App. A, *infra*, 8a), while the Constitution protects advocacy that does not amount to incitement (*id.* at 7a-8a). The court recognized that the Secretary's interpretation of the Daniel Amendment drew such a line, and that if the Secretary's construction of the

Daniel Amendment were accepted, the amendment would be consistent with the distinction between protected and unprotected expression established in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (App. A, *infra*, 8a). But the district court ruled, for two reasons, that the Secretary's interpretation was not "a valid and forceful legal exercise" (*id.* at 11a).

First, the court concluded that since the Secretary's interpretation of the Daniel Amendment had not been published for notice and comment under the provisions of the Administrative Procedure Act, 5 U.S.C. 553, that interpretation must be an "interpretative rule" not a "legislative rule" (App. A, *infra*, 9a). Interpretative rules, the court declared, "do not have the same legal significance as legislative rules" and "lack[ ] 'the force of law'" (*ibid.*). The court added that it further discounted "the legal significance of [the Secretary's] interpretation" because "the sole expression of the Secretary's view of the amendment is contained within the pleadings filed in this litigation" (*id.* at 10a).[3]

Second, the district court rejected the Secretary's interpretation because it was inconsistent with the Daniel Amendment. Specifically, the court found "no support" for the Secretary's interpretation in the congressional debates on the Daniel Amendment (App. A, *infra*, 10a). The court also ruled that it would not "take it upon itself to narrow the amendment so as to [make] it free from constitutional defect" (*id.* at 11a).

Finally, the district court strongly suggested that although the Daniel Amendment as interpreted by the Secretary would comply with the *Brandenburg* test, it would nevertheless be unconstitutional (App. A, *infra*, 11a-12a).[4] The court said that the Amendment would still "fail[ ] to provide the procedural safeguards essential in the first amendment area" such as "prompt final administrative or judicial decision" (*id.* at 11a). The court stated, in addition,

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[3] The court noted that this reasoning had not been put forward by appellee (App. A, *infra*, 9a).

[4] The court acknowledged that in this respect, too, it went beyond the arguments made by appellee (App. A, *infra*, 11a n.19).

that it "perceive[d] no rational objective whatsoever which is furthered by" the Daniel Amendment as interpreted by the Secretary (*id.* at 12a).

The district court accordingly declared that the Daniel Amendment "violates the first amendment to the United States Constitution" and ordered the Secretary to "[e]nsure that [appellee's] application for employment training under the CETA is processed without regard to her political affiliations or beliefs" (App. B, *infra*, 13a).

THE QUESTION IS SUBSTANTIAL

This case is now moot. Appellee has completed the CETA training program to which she sought admission; she therefore has obtained all the relief she requested. No exception to the mootness doctrine is applicable here.

If the Court concludes that the case is not moot, it should note probable jurisdiction because the district court has unnecessarily and erroneously invalidated an Act of Congress. The district court erred, first, in invalidating the Daniel Amendment even though a limiting and undoubtedly constitutional interpretation of the Amendment was available. That interpretation is urged by the Secretary, is strongly suggested by the overall structure of the Act, and is consistent with both the legislative history of the Daniel Amendment and this Court's decisions interpreting similar statutes.

Second, the court gave no adequate reason for excusing appellee from the requirement that she exhaust the administrative remedies prescribed by CETA. Those remedies could have provided appellee complete relief. The administrative proceedings also would have afforded the Secretary an opportunity to apply the Daniel Amendment, as he interpreted it, to the facts of appellee's case. Thus, a constitutional issue might never have arisen, and any issue that did arise would not have been in the abstract form of the issue resolved by the district court.

1. This case is now moot. We are advised by the Secretary that appellee was readmitted to the CETA program pursuant to the order of the district court and, in June

1982, completed her training.[5] Appellee has, therefore, "obtained all the relief that [she] sought. In these circumstances, no live controversy remains" (*Lane* v. *Williams*, No. 80-1240 (Mar. 23, 1982), slip op. 9). This is not a class action, and we have no reason to believe that appellee intends to reapply to another CETA program. See *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

The mootness of this case follows a fortiori from *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). In *DeFunis*, the petitioner challenged a law school admissions policy, prevailed in the trial court, and was accordingly admitted to the law school. By the time the case was submitted to this Court, the petitioner was in his final term of law school. The respondent law school officials represented that even if they prevailed in this Court, they would not alter the petitioner's status. *Id.* at 314-317. The Court concluded that "[b]ecause the petitioner will complete his law school studies * * * regardless of any decision this Court might reach on the merits of this litigation," the case was moot and under Article III, the Court lacked jurisdiction to decide it. 416 U.S. at 319-320.

The dissent in *DeFunis* urged that the case was not moot because "[m]any weeks of the school term remain, and * * * [a]ny number of unexpected events—illness, economic necessity, even academic failure—might prevent [petitioner's] graduation at the end of the term" (416 U.S. at 348). If the petitioner failed to complete his studies, the dissent pointed out, he would again be subject to the admissions policy he challenged. *Id.* at 348-349. The dissent also noted that the court's finding of mootness rested in part on the respondents' voluntary assurances (*id.* at 399).

This case lacks even those features that led the dissent to question whether *DeFunis* was moot. There is no possibility that appellee will not complete the CETA program to which she sought admission; she has already completed it.

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[5] In an affidavit filed in the district court in support of an application for attorney's fees, appellee's counsel stated that appellee had informed him "that she completed the [CETA] brick masonry program on June 11, 1982." Affidavit of Mark Lynch in Support of Motion For an Award of Attorney's Fees, Expenses, and Costs ¶ 15.

Moreover, the mootness of this case does not rest on any assurances given by the Secretary, who has not changed his position or announced a new policy throughout the litigation. This case therefore is not governed by the rule that a defendant who attempts to show mootness after having voluntarily ceased the challenged conduct bears a "heavy burden of persuasion" (*United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968), citing *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).[6]

Because the resolution of this case "cannot affect the rights of [the] litigants" (*North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)), the judgment of the district court should be vacated and the case remanded with instructions to dismiss the complaint as moot. See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

2. a. If the Daniel Amendment were interpreted in the way specified by the Secretary, it would be constitutional. Congress may not punish the advocacy of abstract doctrine calling for the violent overthrow of the government (*Yates* v. *United States*, 354 U.S. 298, 318-327 (1957)), but under *Brandenburg* v. *Ohio*, *supra*, it may punish "advocacy * * * directed to inciting or producing imminent lawless action and * * * likely to incite or produce such action" (395 U.S. at 447). See, *e.g.*, *Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974); *Healy* v. *James*, 408 U.S. 169 (1972). The Secretary's interpretation follows the *Brandenburg* test.[7]

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[6] In addition, this is not a case in which the defendant is merely "compl[ying] with a court order *pendente lite*" and can again damage the plaintiff if the order is vacated as moot. *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 545 (1973) (Marshall, J., dissenting); see, *e.g.*, *Bakery Sales Drivers Local No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948).

[7] The district court was plainly incorrect in suggesting that the Amendment might be unconstitutional even as interpreted by the Secretary. Congress may punish as a crime the speech left unprotected by *Brandenburg*; deterring such activity is a sufficient rational basis for the Daniel Amendment. The "procedural safeguards" of which the court spoke (App. A, *infra*, 11a, citing *Freedman* v. *Maryland*, 380 U.S. 51 (1965)) apply to the "administration of a censorship system" (*id.* at 57), not to the imposition of an after-the-fact sanction on unprotected speech (*id.* at 57-58).

The district court declared, however, that the Daniel Amendment could not be construed, by either the Secretary or the court, to apply only to unprotected speech; such a construction, in the court's view, would not be consistent with Congress's intent (App. A, *infra*, 10a-11a). Since the court believed that the amendment prohibited protected speech, it invalidated the amendment on its face, without considering whether appellee would have been barred from CETA programs under the Secretary's interpretation. The court was in error for several reasons.

The Daniel Amendment uses the term "advocate." In an earlier case involving the construction of a statute limiting expression, this Court interpreted the term "advocate" to conform to constitutional requirements, reasoning that "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the word[ ] 'advocate' * * * in [its] ordinary dictionary meaning[ ] when [it] ha[d] already been construed as [a] term[ ] of art carrying a special and limited connotation." *Yates* v. *United States*, *supra*, 354 U.S. at 319. See also *Dennis* v. *United States*, 341 U.S. 494, 499-502 (1951) (plurality opinion); *Scales* v. *United States*, 367 U.S. 203, 221-222, 228-230 (1961). The district court maintained that the legislative history of the Daniel Amendment shows that Congress intended to disregard the limited meaning traditionally given the term "advocate" and to reach protected expression (App. A, *infra*, 10a-11a & n.17); in fact, the meager legislative history of the Daniel Amendment—which was a floor amendment to an appropriations measure and was not considered by a committee—shows that a Senator who introduced the amendment, in explaining the advocacy it covered, specifically referred to "a series of court decisions which pretty well characterize those remarks which would be considered advocating the violent overthrow of the U.S. Government." 126 Cong. Rec. S16742 (daily ed., Dec. 16, 1980) (remarks of Sen. Warner).

Moreover, as we have noted, CETA contains an explicit prohibition against discrimination on the basis of "political affiliation or belief" (29 U.S.C. (Supp. IV) 834(a)). The Daniel Amendment did not expressly repeal that prohibi-

tion. Repeals by implication are not favored (see, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)), particularly "when the provision advanced as the repealing measure was enacted in an appropriations bill" (*United States* v. *Will*, 449 U.S. 200, 222 (1980)). This "long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions" (*St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 788 (1981)). Since some advocacy is implicit in affiliation, and is almost always an incident of political belief, the most reasonable interpretation of the Act as a whole (see *Richards* v. *United States*, 369 U.S. 1, 11 (1962)) is that only those who engage in unprotected incitement, not those who merely advocate their political beliefs, may be barred from the CETA program.

This Court has recently emphasized that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems" (*New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 22 n.24). The Court will not reject a construction that saves a statute from unconstitutionality merely because another construction is arguably more consistent with Congress's intentions; "an Act of Congress ought not be construed to violate the Constitution if any other *possible* construction remains available" (*NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (emphasis added)). Here such a construction not only was suggested by the conventional indicia of legislative intent but was specifically urged by the Secretary of Labor, the official who is responsible for administering CETA and whose view is therefore entitled to deference (see, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979) ("Such deference is particularly appropriate where * * * an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of

its statutory objectives.")). See also *Broadrick* v. *Oklahoma*, 413 U.S. 601, 617-618 (1973); *Law Students Civil Rights Research Council* v. *Wadmond*, 401 U.S. 154, 162-163 (1971).[8]

Finally, even if Congress unquestionably intended the Daniel Amendment to apply to those who engaged in protected speech, the district court erred in simply striking the statute down on its face and ordering relief. "[I]f [a] federal statute is not subject to a narrowing construction * * * it nevertheless should not be stricken down on its face; if severable only the unconstitutional portion is to be invalidated." *New York* v. *Ferber*, *supra*, slip op. 22 n.24. See, *e.g.*, *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 367-375 (1971); *id.* at 375 n.3 (plurality opinion). See also *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy."). Specifically, the invalid applications of a statute are to be severed, and the valid applications left standing, "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not'" (*Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)). Only "in th[e] rarest of cases [can]

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[8] The district court discounted the Secretary's construction because it was not promulgated under the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553 (App. A, *infra*, 9a). The APA, however, does not require an agency to issue every interpretation of a statute it is enforcing as a rule subject to Section 553. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-766, 772 (1969). See also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200-203 (1947). Moreover, in establishing an adjudicatory grievance mechanism in CETA, Congress plainly envisioned that the Secretary would determine the proper construction of many provisions in the course of deciding particular cases.

It is particularly ironic that the district court criticized the Secretary for stating his interpretation of the Daniel Amendment only in "the pleadings filed in this litigation" (App. A, *infra*, 10a); by not requiring the exhaustion of administrative remedies, the court ensured that the Secretary would first be confronted with the specific facts of appellee's case, and the need to construe the Daniel Amendment, only in this litigation. See pages 13–15, *infra*.

this Court * * * justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application." *United States* v. *Raines*, 362 U.S. 17, 23 (1960). If, as the district court supposed, Congress intended the Daniel Amendment to bar even advocates of abstract ideas from CETA programs, then plainly Congress, had it recognized that this objective was not within its power, would have barred those who engage in unprotected incitement.

b. In light of the Secretary's reasonable interpretation of the Daniel Amendment, the issues resolved by the district court might never have arisen at all—and certainly would not have arisen in such an abstract form—if the district court had not erroneously excused appellee from the requirement that she exhaust the remedies specified in CETA. "The doctrine of exhaustion of administrative remedies is well established * * *. [It] provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969), quoting *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

A claimant need not, of course, exhaust remedies that are plainly inadequate to provide the relief he seeks. See, *e.g.*,*Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773-774 (1947). But the district court did not conclude, and could not have concluded, that the CETA procedures were inadequate to provide appellee the relief she sought—admission to the VEC program. Had appellee pursued a grievance against the VEC, the Secretary might well have concluded that the Daniel Amendment, as he interpreted it, did not bar her admission; if she were otherwise eligible, he would then have ordered the VEC to admit her. But the Secretary never had the opportunity to make this

determination. Indeed, it remains unclear today whether appellee falls within the Daniel Admendment as interpreted by the Secretary.[9]

The district court did not deny that an applicant who, like appellee, believes a prime sponsor has wrongfully excluded him from a CETA program generally must exhaust the grievance and review procedure specified in the Act. The court asserted, however, that appellee was not required to exhaust the statutory remedies because "the sole question here is the 'purely legal' one of the constitutionality of a congressional enactment" (App. A, *infra*, 7a), and the Secretary had no particular expertise in dealing with such a question. This is incorrect; as the remainder of the district court's opinion shows, the principal issue in this case is the interpretation of the Daniel Amendment. The processes appellee failed to invoke would have provided a particularly appropriate forum in which to resolve this issue. Since the Secretary was "charged with [the] execution" of the Daniel Amendment (*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)), Congress must have intended that he be allowed the first opportunity to interpret it and that his interpretation be given deference.

In addition, as we have noted, CETA contains a provision strictly forbidding discrimination on the basis of political affiliation or belief. See page 4, *supra*. The provisions of CETA establishing the grievance procedure specifically require the Secretary promptly to take "such corrective measures, as necessary," to remedy any violation of this prohibition by a prime sponsor. 29 U.S.C. (Supp. IV) 816(f).[10] Because the Daniel Amendment makes no explicit reference to this prohibition, the Secretary's resolution of appellee's claim would have involved (and his

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[9] For example, the description of appellee's views given by the district court (App. A, *infra*, 4a) would not by itself be sufficient to bar her from a CETA program, under the Secretary's interpretation.

[10] The Act also provides that the Secretary "shall * * * terminate financial assistance" to any prime sponsor who engages in a pattern or practice of "exclud[ing] any person from participation in" or "subject[ing any person] to discrimination under" a CETA program "on the ground of * * * political affiliation or belief" (29 U.S.C. (Supp. IV) 816(c)(1) and 834(a)).

interpretation of the Daniel Amendment reflects; see pages 10–11, *supra*) an effort to reconcile the Daniel Amendment with the prohibition against political discrimination. This exercise in statutory construction is peculiarly within the Secretary's "discretion * * * [and] expertise" (*McKart* v. *United States*, *supra*, 395 U.S. at 194). The district court therefore had no basis for exempting appellee from the traditional rule requiring the exhaustion of administrative remedies.[11]

By not requiring appellee to invoke the statutory remedies, the district court in effect created a constitutional controversy between appellee and the Secretary where none truly existed. At the time appellee sued the Secretary, the Secretary had neither taken nor threatened to take any action against appellee. Only the VEC had taken an action, and it is undisputed that the Secretary was not involved in that action. The district court observed that "[t]he administrative remedies allegedly available to [appellee] apply to [a] dispute[ ] between a prime sponsor and a CETA employee, not between an employee and the Secretary" (App. A, *infra*, 7a); but at the time of the suit, appellee's only dispute was with the VEC, and as far as appellee knew the Secretary might have agreed with her that the VEC should not have excluded her from the program.

Moreover, if appellee had pursued her statutory remedies and the Secretary had rejected her complaint, judicial review proceedings would have focused on the question whether the Daniel Amendment *as interpreted and applied by the Secretary* is unconstitutional. The court reviewing the Secretary's determination would have had no occasion to consider the question that the district court decided—

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[11] The district court's other reason for not requiring appellee to exhaust the statutory remedies is in fact a reason to require exhaustion. The court characterized appellee's contention as a claim that the Secretary unlawfully "fail[ed] to insist that [the Daniel A]mendment [be] implemented in a fashion consistent with the first amendment" (App. A, *infra*, 7a). The statutory grievance procedure is designed precisely to give applicants a way to have the Secretary "insist" on certain actions by prime sponsors.

the constitutionality of the Daniel Amendment as broadly interpreted. See *Ashwander* v. *TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss the complaint as moot. If the Court determines that the case is not moot, probable jurisdiction should be noted.

Respectfully submitted.

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